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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 590

JAMES UTLEY, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

Upon Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

JAMES UTLEY, *Petitioner,*
By JOHN F. SHEFFIELD,
515 Broadway Arcade Building, Los Angeles,
Counsel for Petitioner.

A. BRIGHAM ROSE,
Of Counsel.

Parker & Baird Company, Law Printers, Los Angeles.

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IN THE

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OCTOBER TERM, 1940.

No. .....

JAMES UTLEY, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

Upon Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Charles Evans Hughes, Chief Justice, and to the Associate Justices of the Supreme Court of the United States:

Your petitioner, James Utley, through his counsel and attorney, prays this court to issue a Writ of Certiorari to bring up the above entitled cause, as it affects your Petitioner, for review.

Jurisdictional Statement.

Petitioner was indicted on two counts for violation of Title 21, U. S. C. A., Section 174, and Section 2553 (a), Internal Revenue Code, in the District Court of the United States, in and for the Southern District of California, Central Division, by re-indictment,[1] filed September 20, 1939. [R. pp. 1-3.]

[1]See allegations respecting first indictments in Brief Statement of the Facts.

A Demurrer to said Indictment was duly filed and overruled October 2, 1939. [R. pp. 3-7.] The cause was set for trial October 17, 1939; the trial concluded on the 19th day of October, 1939, and on October 20th, 1939, the jury returned a verdict of guilty to each count. [R. pp. 10-12.]

Thereafter, motions for new trial were duly filed [R. pp. 13-25], and on November 6, 1939, motions for new trial were denied and exceptions allowed. [R. p. 26.]

The court thereupon pronounced sentence on Count 1 for one year, eleven months and thirteen days, and for the period of five years on Count 2 of the Indictment, execution of sentence imposed on Count 2 being suspended and defendant placed on probation for five years from and after his release from serving the sentence on Count 1. [R. pp. 27-28.]

Thereafter, on the 9th day of November, 1939, Notice of Appeal to the Circuit Court of Appeals from the judgments and orders aforesaid was duly filed. [R. pp. 29-32.] The appeal was duly perfected and came on for oral argument on Friday, October 18, 1940, before Denham, Matthews and Stephens, Circuit Court Judges, United States Circuit Court of Appeals for the Ninth Circuit. [R. p. 283.]

Thereafter, on October 25, 1940, order directing filing of opinion and record of judgment was duly entered, and opinion and judgment filed and entered on October 25, 1940. [R. pp. 283-289.][2]

The above mentioned Circuit Court of Appeals affirmed the orders and judgments of the court below. Petitioner

[2]For the convenience of this Honorable Court copy of opinion is annexed in the appendix hereof.

now seeks review of the aforesaid proceedings by this Court, upon which jurisdiction to review the same is conferred by *28 U. S. C., Sec. 247*, and authorities in *25 C. J., p. 947, Sec. 309.*

Summary Statement of Matters Involved.

(a) The Circuit Court of Appeals, for the Ninth Circuit, has decided a federal question in conflict with applicable decisions of this Court by necessary intendment,[3] it being contended in said Honorable Court that the judgment rested almost in its entirety on intercepted telephone communications between the Petitioner and another party, contrary to and in violation of the provisos in Title 47, U. S. C. A., Section 605.

(b) The Circuit Court of Appeals has rendered a decision in conflict with the decisions of another Circuit Court of Appeals on the same matter, to-wit, the character, form and context of the Indictment under Constitutional Amendments 5 and 6 failed to inform the accused of the nature of the cause of the accusation in sufficient form to enable Petitioner to make his defense.

(c) The Circuit Court of Appeals has rendered a decision in conflict with the decisions of another Circuit Court of Appeals on the same matter, to-wit, in having authorized two penalties for an alleged single offense, constituting double punishment.

(d) The Circuit Court of Appeals has decided an important question of federal law, which has not been, but

[3]The opinion of the Circuit Court actually fails to reflect the grounds for affirmance of the judgments, the Court virtually declining to review any of the multitudinous assignments of error on purely technical grounds.

should be settled by this Court, to-wit, the right of trial counsel to waive admitted prejudicial error without the accused's actual consent.

(e) The Circuit Court of Appeals has departed from the accepted and judicial course of procedure, which calls for an exercise of this Court's power of supervision, the Circuit Court having declined to recognize obvious prejudicial error and to give protection against an unlawful conviction.[4]

Reasons Relied Upon for the Allowance of the Writ.

(a) Before the Circuit Court of Appeals, for the Ninth Circuit, the Petitioner urged that the case against him rested in its entirety on two intercepted telephone communications between a witness not produced at the trial and this Petitioner, citing as authority for the illegality of said evidence the authorities of this Honorable Court.[5]

As applied to him, the Petitioner contends that the Circuit Court of Appeals for the Ninth Circuit completely ignored this contention, but by necessary intendment[6] decided contrary to the decisions of this Court,[7] and in conflict with the decision of the Circuit Court of Appeals, Second Circuit.[8]

(b) This Petition brings to this tribunal for determination the question whether the matters set forth in the

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[4]*Ray v. United States,* 114 Fed. (2d) 508.

[5]*Nordone v. United States,* 302 U. S. 379, 383, 58 S. Ct. 275, 277, 82 L. Ed. 314; *Nordone v. United States,* 308 U. S. 338; *Weiss v. United States,* 308 U. S. 321; *United States v. Palakoff et al.,* 112 Fed. (2d) 888, 889.

[6]Footnote 2 under Summary Statement of Matters Involved, *ante.*

[7]*Nordone v. United States, supra.*

[8]*United States v. Palakoff, supra.*

Indictment [R. pp. 1 to 3] comply with the Constitutional Amendmetns 5 and 6 respecting the form and substance of the accusation against your Petitioner, whose Demurrer thereto was overruled. [R. pp. 4 and 6.]

The Indictment in the instant case is manifestly insufficient on authority of *Boykin v. United States,* 11 Fed. (2d) 484, and *Fontana v. United States,* 262 Fed. 283.

The position of the United States Circuit Court of Appeals for the Ninth Circuit is in sharp conflict with the holdings of other Circuit Courts of Appeals on this question, as is reflected in the Table of Circuits showing the split decisions, set forth in the footnote below.[9] Such conflict calls for clarification and authoritative determination by this Court.

(c) This Petition brings to this tribunal for determination a clarification of the jurisdiction of trial courts of the United States to carve out of a single offense,[10] two causes upon which double punishment has been imposed on your

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[9]Table of Circuits, showing split in decisions:

For Petitioner	*Circuit*	*Against Petitioner*	*Circuit*
Skelly v. U. S., 37 Fed. (2d) 503 ('30)	10th Cir.	*Rosenberg v. U. S.*, 13 Fed. (2) 369 ('26)	9th Cir.
Fontana v. U. S., 262 Fed. 283 ('19)	8th Cir.	*Yip Wah v. U. S.*, 8 Fed. (2d) 478 ('25)	9th Cir.
Lynch v. U. S., 10 Fed. (2d) 947 ('25)	8th Cir.	*Wong Ling Sing v. U. S.*, 3 Fed. (2d) 780, C. C. A. 1925	9th Cir.
Jarl v. U. S., 19 Fed. (2d) 901 ('27)	8th Cir.	*Wong v. U. S.*, 3 Fed. (2d) 780 ('25)	9th Cir.
Partson v. U. S., 20 Fed. (2d) 127 ('27)	8th Cir.	*Parmagin v. U. S.*, 42 Fed. (2d) 721 (Cal., 1930)	9th Cir.
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Boykin v. U. S., 11 Fed. (2d) 484 ('26)	5th Cir.		
Bratton v. U. S., 73 Fed. (2d) 795 ('34)	10th Cir.		

[10]Title 26, U. S. C. A., Sec. 2553(a); Title 21, U. S. C. A., Sec. 174.

Petitioner. The decision sought to be reviewed by this Court is in conflict with the decisions of other Circuit Courts of Appeals.[11] Such conflict calls for clarification and authoritative determination by this Court.

The judgments imposed on Petitioner herein are violative of Articles V, XIII and XIV of the Constitution of the United States.

(d) This Petition raises the important question of federal constitutional law, involving the right of counsel, after the court has permitted prejudicial error, to waive the error to the prejudice of his client, especially in the absence of the express consent of the accused.

In the case of your Petitioner, the Government's counsel was cited for misconduct and the trial court declared that the matter was so prejudicial that there was nothing to do but declare a mistrial. Trial counsel thereupon withdrew the assignment, Petitioner not consenting, and the trial thereupon proceeded.

Extensive research has revealed a single decision on this point, to-wit, the case of *United States v. Newman,* 25 Fed. (2d) 357, the District Court opinion holding that when the court has permitted prejudicial error, counsel cannot waive the error to the prejudice of his client. The opinion sought to be reviewed holds: "Appellant, having brought about this result, cannot be heard to complain of it." As applied to him, Petitioner contends that, he personally having failed to consent to this waiver, the doctrine enunciated in the District Court case, *United States v. Newman, supra,* is a correct statement of the law, and that this Court should make its verification of this constitutional right.

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[11] *Copperwaithe v. U. S.,* 37 Fed. (2d) 846; *Ballerina v. Aderholt,* 44 Fed. (2d) 352.

Brief Statement of the Facts.

Petitioner was arrested by three officers in Los Angeles, on Saturday, the 23rd day of January, 1937, and was jailed and booked "on suspicion" of narcotics, robbery and extortion. [R. pp. 147 and 174.]

Petitioner remained in jail for three days and was thereupon released. Petitioner was never proceeded against on any of the said charges; there was not a word of testimony every adduced upon which the two last described charges were founded. However, on the 12th day of April, *1939*, while he was engaged in behalf of a Civic Committee, investigating activities of the local Los Angeles County District Attorney, he was re-arrested on the asserted narcotic's charge incident aforementioned, of January 23, 1937. [R. p. 174.]

On the 11th day of April, 1939, one of the three aforementioned officers was suddenly called before the Grand Jury by the District Attorney. Albeit none of the officers involved had taken any action in the interim subsequent to Petitioner's release after his arrest on the 23rd day of January, 1937. [R. p. 91; pp. 133-134; pp. 114-116.]

An Indictment was returned April 12th, 1939, and the case continued from time to time but ultimately set for the 11th day of September, 1939, the proceedings being contrary to the express provisos of the Penal Code of the State of California.[12]

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[12]Section 1050, Penal Code, State of California, provides that all criminal cases be set for trial not later than thirty days after the date of the entry of the plea of the defendant.

Section 1382, Penal Code, provides when a person has been held to answer for a public offense and an information is not filed against him within fifteen days thereafter, or if defendant whose trial has not been postponed upon his application, has not been brought to trial within sixty days after finding of the indictment, it should be dismissed.

On the 30th day of August, 1939, pending said trial, a federal officer named George Gyllenhammer arrested Petitioner on an Indictment similar in nomenclature to that set forth in the Record, page 1, charging violation of Title 21, U. S. C. A., Section 174, Count 1, and on Count 2, violation of Section 2553 (a), Internal Revenue Code. For some unexplained reason, said Indictment incorporated certain aliases as a supplement to the true name of Petitioner. His arraignment was set for September 11, 1939, the date set for the trial in the Superior Court of Los Angeles County, on which occasion the local District Attorney dismissed the action.

The Government counsel confessed statements in the said Indictment were prejudicial and procured the re-Indictment set forth in the Record, page 1, on September 20, 1939.

It may not be amiss to herein indicate that preceding these incidents, the Deputy District Attorney of Los Angeles County assigned to try the case resigned from that office on the 11th day of August, 1939, because he did not choose to try the case. [R. p. 181, *et seq.*]

Although Petitioner had been arrested for the asserted possesion of Government's Exhibit No. 1, on the 23rd day of January, 1937, no attempt to analyze the contents of the alleged contraband contained in said Exhibit No. 1 had ever been made by the local authorities until (?) the date that Petitioner was indicted as herein alleged, on the 12th day of April, 1939. [R. p. 149, *et seq.*] The Exhibit

was not turned over to the Government until after the Indictment of your Petitioner, on the 30th day of August, 1939, as hereinbefore alleged. [R. p. 48.] In fact the Government made no analysis until the 5th day of September, 1939 (after indictment). [R. p. 58.]

Petitioner submits that all of the officers involved admitted that it was customary to destroy evidence of this character within one year after arrest [R. p. 98], and the evidence reflects that actual instructions to destroy this Exhibit had been received on March 28, 1939, some weeks prior to the re-arrest, and some five months prior to the first Indictment upon which Petitioner was brought to trial in the District Court of the United States, in and for the Southern District of California, Central Division.

The evidence relied upon by the Government was the testimony of the three officers heretofore referred to, who testified that two of them reported for duty on the 23rd day of January, 1937, at 8:00 o'clock a. m., and would normally have ceased their duties at 5:00 o'clock p. m., and entered an apartment without process, occupied by two young ladies whom they had never seen before at about 11:00 o'clock a. m. on said 23rd day of January, 1937, and remained in said apartment until 7:00 o'clock p. m. [R. pp. 49, 88, 91, 138.]

The officers all admitted that they had never seen Petitioner prior to 9:00 o'clock p. m. that night; had never talked to him over the telephone, or otherwise. [R. pp. 52-53.] The principal of these three officers, one Ray-

mond W. Clarke, testified that he induced one of the young ladies occupying said apartment, to-wit, Betty Angel, to telephone your Petitioner and by listening in assertedly overheard the conversation between the said Betty Angel and your Petitioner, and a subsequent return call by your Petitioner to the said Betty Angel [R. pp. 55-58] and, as a result of intercepting said phone conversation, that said Officer Clarke staked out some ninety feet in a dark street, across the street from the building, and there assertedly saw Petitioner drive up, approach an archway in the premises, drive away and later return and that, after Petitioner had been arrested, in his absence and in the absence of any other person, the said Clarke claims that he found at a step near the archway Government's Exhibit No. 1. [R. pp. 70-75.]

Petitioner denied the conversations reputed to him by the interceptor, Officer Clarke. None of the two women occupants of the apartment were called as witnesses at the trial, although the Government did subpoena one, and had her available in court. [R. p. 7 *et seq.;* R. p. 79.]

The alleged intercepted phone conversations pertained to "white stuff" and "black stuff". No evidence whatsoever was offered at the trial as to the alleged significance of either "black stuff" or "white stuff". There was no testimony that Petitioner was ever seen in possession or control of Government's Exhibit No. 1.

In the early stages of the trial Government's Counsel, in the questioning of Officer Raymond W. Clarke, admitted that with knowledge of the expected answer, he elicited from said officer an alleged conversation with your Petitioner in 1937, whereby said officer in his testimony reflected an alleged proposed bribery of police officers by

your petitioner and extortion of several women. Assignment for misconduct of Government's Counsel was allowed, and the trial court declared in unequivocal terms that there was nothing to do but declare a mistrial. Trial Counsel for the Petitioner withdrew the assignment, and requested an admonition to the jury to disregard the incident, in which waiver Petitioner personally did not acquiesce. These incidents are set out in the record, pp. 81 to 88.

The opinion of the Circuit Court of Appeals [R. pp. 284 to 288] recites that the said question "was not objected to . . . and that Appellant having brought about this result cannot be heard to complain about it . . ."[13]

At the conclusion of the Government's case, motion for directed verdict was denied and excepted to. [R. p. 169.] The Government thereupon reopened its case upon leave of court [R. p. 169], and admitted Government's Exhibit No. 1 (the contraband referred to in the indictment) over objection and exception of Petitioner. [R. p. 170.]

The Government's Counsel, during the closing argument, proceeded to vociferously argue to the jury that Petitioner was guilty of corrupting local authority, reiterated the prejudicial matter which the trial court had already indicated called for a mistrial, and transcended any legitimate bounds of argument countenanced by any of the decisions reviewed by this Court. [R. pp. 195-203.]

The case was submitted to the jury at 2:38 o'clock p. m.; at 10:30 o'clock p. m. the court reconvened and re-

[13]The record, pp. 80, 82 and 83, shows continuous objections to said prejudicial matter.

instructed the jury at their request; at 12:02 o'clock a. m. the court, addressing the jury, stated: "Let us find out what each man on the jury thinks about the possibilities of arriving at a verdict." Several of the jurors answered "No"; some thought they could, they should; others said "Possibly", whereupon the jury retired and returned at 12:40 o'clock a. m. with the verdicts. [R. pp. 232-234.]

The trial court had refused Counsel's request to instruct the jury after they returned for further instructions, respecting their duty to perform their deliberations honestly and conscientiously, and not to surrender their honest convictions for the sake of arriving at a verdict; and to also instruct the jury on the law respecting proof, namely, that one witness whose testimony is entitled to credence is sufficient to overcome testimony of several witnesses. [R. pp. 228-229.] The court, however, declined to give such instructions, nor were these instructions given at all.

Sentences imposed and the action of the trial court after the verdict are set forth in the Jurisdictional Statement, *supra*.

Specifications of Error Relied On.

The Specifications of Error relied on in the appeal taken to the Circuit Court of Appeal [R. pp. 241-268] are respectfully called to the attention of this Honorable Court.

What the Petitioner requests the Court to consider here is not a question of the sufficiency of the evidence, but whether the Petitioner received the kind of trial guaranteed under the laws of the United States. It was held in *Barr v. United States*, 9 Fed. (2d) 820, that an accused could not be required to waive his right of appeal.

In the case of this Petitioner, the Circuit Court of Appeals has departed from the accepted and judicial course of procedure, virtually arbitrarily refusing to consider the points on appeal.

It is the contention of the Petitioner that the Court should have instructed as requested in Brief Statement of Facts, *infra,* supported by authority,[14] and should have not made the inquiry of the jury in the manner set forth in the Statement.[15]

The Circuit Court Opinion sought to be reviewed cites its previous opinion, *Waggoner v. United States* 113 Fed. (2d) 867, 868, which opinion in effect holds there is no such thing as misconduct of Government's Counsel.

Under the exercise of this Court's power of supervision, in the light of its previous pronouncements,[16] the Circuit Court should be advised that the plain error should be noticed, even in the absence of assignment.

Dated: At Los Angeles, California, this 20th day of November, 1940.

JAMES UTLEY, *Petitioner.*

By JOHN F. SHEFFIELD,
Counsel for Petitioner.

A. BRIGHAM ROSE,
Of Counsel.

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[14]*Berger v. United States,* 62 Fed. (2d) 438, at p. 440.

[15]Brief Statement of Facts, *supra. Brasfield v. United States,* 272 U. S. 448, 450, 71 L. Ed. 345.

[16]*United States v. White,* 77 Fed. (2d) 757; *United States v. Atkinson,* 297 U. S. 157; *Newman v. United States,* 224 Fed. 95; *Berger v. United States,* 295 U. S. 78; *Pharr v. United States,* 488 Fed. (2d) 757.

APPENDIX.

In the United States Circuit Court of Appeals for the Ninth Circuit.

James Utley, Appellant, vs. United States of America, Appellee. No. 9370. Oct. 25, 1940.

Appeal from the District Court of the United States for the Southern District of California, Central Division.

Before Denman, Mathews and Stephens, Circuit Judges.

MATHEWS, Circuit Judge:

Appellant was indicted in two counts. Count 1 charged that appellant had purchased, sold, dispensed and distributed approximately 200 grains of smoking opium which was not in, nor from, the original stamped package —a violation of §2553(a) of the Internal Revenue Code,[1] 26 U. S. C. A. §2553(a). Count 2 charged that appellant had fraudulently received, concealed, bought and sold, and had facilitated the transportation and concealment of, approximately 200 grains of smoking opium, knowing the same to have been imported into the United States contrary to law—a violation of §2(c) of the Opium Act of 1909, as amended,[2] 21 U. S. C. A. §174. Appellant

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[1]Section 2553(a) provides: "It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550(a) except in the original stamped package or from the original stamped package. . . ." One of the drugs mentioned in § 2550(a) is opium. Section 2557(b) provides: "Any person who violates or fails to comply with any of the requirements of this sub-chapter [§§ 2550-2565] . . . shall, on conviction, be fined not more than $2,000 or be imprisoned not more than five years, or both, in the discretion of the court."

[2]Section 2(c) provides: "If any person fraudulently or knowingly . . . receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any . . . narcotic drug . . . knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than $5,000 and imprisoned for not more than ten years."

was arraigned, pleaded not guilty, was tried, convicted and sentenced on both counts, and has appealed.

There are 38 assignments of error. Five of the assigned errors (assignments 1, 8, 9, 16 and 34) were not specified in appellant's brief, as required by our Rule 20(e), nor were they argued in appellant's brief or orally. Twelve others (assignments 5, 13, 14, 19, 26-33) were specified, but were not argued. These assigned errors are, therefore, deemed to have been waived.

Of the remaining assignments, nine (assignments 3, 4, 6, 7, 10, 15, 20, 36 and 37) are not proper assignments of error, but are mere misstatements of the record. Assignments 3 and 36 state that certain motions were made at the conclusion of the Government's case and were denied. Assignments 4 and 37 state that certain motions were made at the conclusion of the entire case and were denied. Assignments 6, 7, 10, 15 and 20 state that certain rulings were excepted to by appellant. These statements are false. The motions referred to were not made: the exceptions referred to were not taken. These assignments present nothing for review.

There remain for consideration assignments 2, 11, 12, 17, 18, 21-25, 35 and 38.

Assignment 2 is that the court erred in denying appellant's motion for a new trial. This ruling was not assignable as error. Sutton v. United States, 9 Cir., 72 F.2d 863, 865.

Assignment 11 is that the court erred in permitting the trial to proceed after a Government witness, in response to a question by Government counsel, had testified to a conversation between appellant and one Greetan. The record shows that the question was not objected to, but

that, after it had been answered, appellant's counsel asserted that the asking of it constituted "prejudicial misconduct." There was, however, no request that a mistrial be declared. On the contrary, the court having indicated a willingness to declare a mistrial, appellant's counsel expressed the belief that the jury was "an intelligent body and, under proper admonition . . . could disregard this incident," and that a mistrial could thus be avoided. Thereupon appellant, by his counsel, withdrew the "assignment of misconduct" and requested that the court "merely admonish the jury to disregard the statements reputedly made in this conversation and . . . strike from the record the conversation assertedly testified to by this witness." The request was granted and the trial proceeded. Appellant, having brought about this result, cannot be heard to complain of it.

Assignment 12 is to the admission of evidence. It does not quote the grounds urged at the trial for the objection or the exception taken—if indeed there was any objection or exception—or the full substance of the evidence admitted, as required by Rule 2(b) of our rules governing criminal appeals. Hence, this assignment will not be considered. Waggoner v. United States, 9 Cir., 113 F.2d 867, 868.

Assignments 17 and 18 are that the court erred in refusing to give the jury certain instructions requested by appellant. The refusal was not excepted to and was, therefore, not assignable as error. Waggoner v. United States, supra.

Assignment 21 is that the court erred in permitting the case to go to the jury after Government counsel had made a closing argument portions of which the assignment characterizes as "prejudicial misconduct." There was, at

the time of the argument, no objection thereto except a statement by appellant's counsel that he was going to assign as misconduct and as being improper "the allusion to [appellant] as a narcotic peddler." There was, in fact, no such allusion, nor did appellant at any time object to the submission of the case to the jury. There is, therefore, no basis for this assignment.

Assignment 22 is that "The court erred in submitting to the jury the single sheet verdict referring to the dual charges contained in counts 1 and 2 of the indictment, and in failing to instruct the jury that [appellant] could not be convicted of both of these offenses for one reputed transaction." This assignment is unintelligible.

Assignment 23 is that "The court erred in imposing sentences on both counts of the indictment." Assignment 24 is that "The court erred in imposing any sentence." These assignments are too general. They do not set out separately and particularly the errors asserted and intended to be urged, as required by Rule 2(a) of our rules governing criminal appeals. Consequently, they will not be considered.

Assignment 25 is that the court erred in failing to declare a mistrial after Government counsel had elicited from a Government witness testimony to the effect that appellant "was assertedly engaged in bookmaking activities." Appellant never asked that a mistrial be declared. Instead, he moved that the testimony be stricken, that the jury be instructed to disregard it, and that the witness be admonished to refrain from voluntary statements of similar character. The motion was granted. Nothing more was required.

Assignment 38 is that the court erred in permitting certain cross-examination of appellant. The cross-examination consisted of fourteen questions, only two of which were objected to. Both objections were sustained. Hence, this assignment presents nothing for review.

Judgment affirmed.

(Endorsed:) Opinion. Filed Oct. 25, 1940. Paul P. O'Brien, Clerk.

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No. 590.

JAMES UTLEY,

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UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

JOHN T. SHEFFIELD,
515 Broadway Arcade Building, Los Angeles,
Attorney for Petitioner.

A. BRIGHAM ROSE,
Of Counsel.

Parker & Baird Company, Law Printers, Los Angeles.

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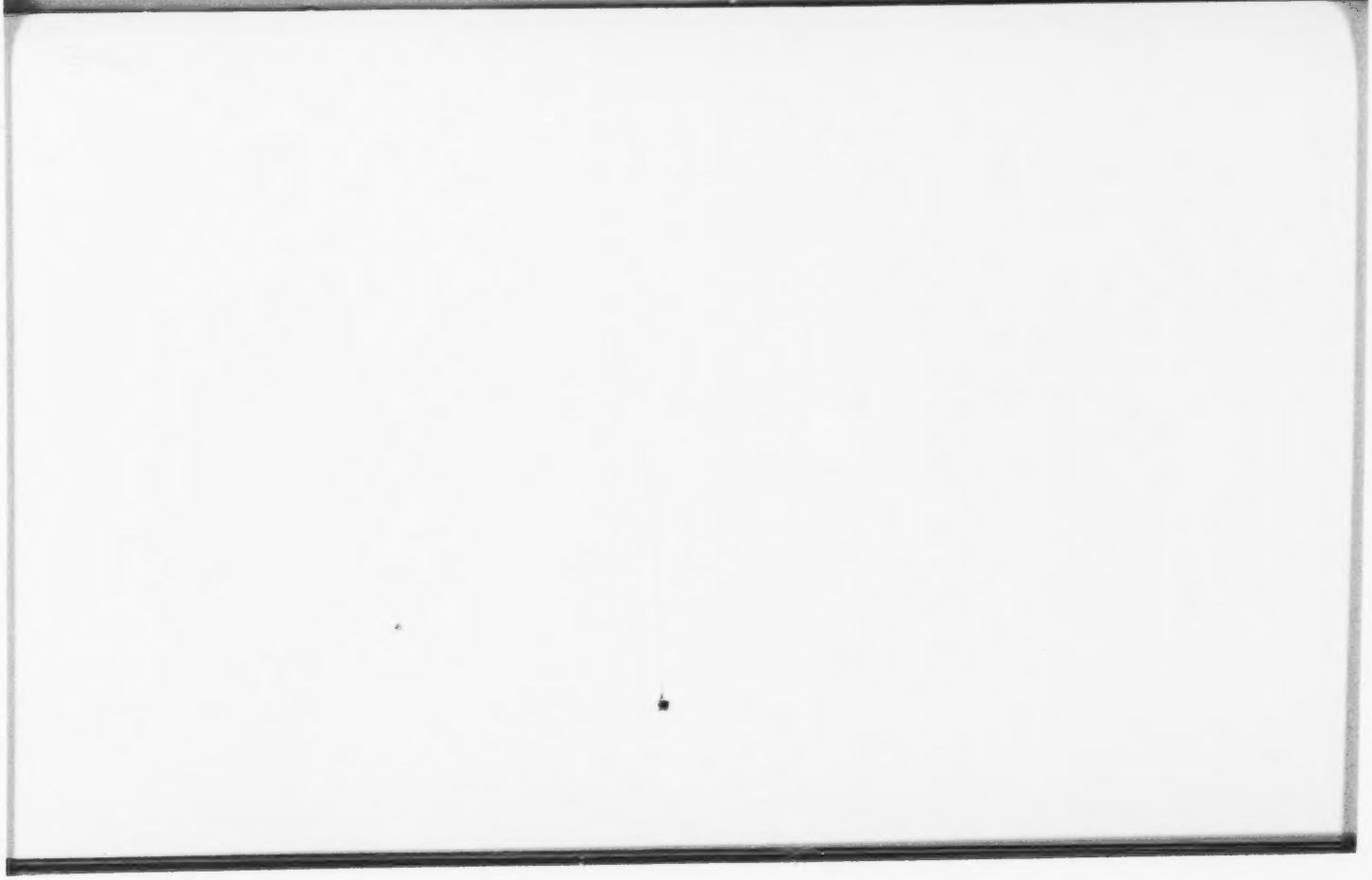

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 590.

JAMES UTLEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit is set out in the appendix to the petition for writ of certiorari, heretofore docketed on the 22nd day of November, 1940, and is part of the certified transcript of record, previously filed in this Court, to be found on pages 284 to 288 thereof.

II.
Jurisdiction.

1. STATUTORY PROVISIONS SUSTAINING JURISDICTION.

The jurisdiction of this Court is invoked under Section 247 of Title 28 of the United States Code to review any criminal case pending or decided by the Circuit Court of Appeals.

2. FINALITY OF JUDGMENT.

The judgment forming the basis of petition is final, the Court below having caused to be filed its opinion and judgment in affirmance, albeit it is not conceded by petitioner that said Court endeavored to dispose of any of the errors in controversy assigned to the trial court below.* Your petitioner deferentially interposes that the Honorable Circuit Court arbitrarily declined to review the errors assigned on hyper-technical grounds.

3. PETITION TIMELY FILED.

The final judgment of the United States Circuit Court of Appeals for the Ninth Circuit was filed October 25, 1940 [R. 288], under Section 723(a) of Title 28, U. S. C., and Rule 11 of the general rules of this Court in criminal cases. Petition to review judgment of an appellate court may be made within thirty days after the entry of the judgment in that court.

4. STATEMENT OF THE CASE.

A summary statement of the case has been given under the heading "Summary Statement of the Facts Involved," page 3 *et seq.* of the petition for writ of certiorari, and is not repeated at this point.

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*Attention is respectfully directed to the Opinion in the Appendix to Petition for Writ of Certiorari.

III.

Issues Involved.

1. Before the Circuit Court of Appeals for the Ninth Circuit petitioner urged that the case against him rested in its entirety on two intercepted telephone communications between a witness not produced at the trial and your petitioner.

As applied to him, your petitioner contends that the Circuit Court of Appeals failed to recognize and comment on, or decide on this question, notwithstanding that the cases of this Court and a Circuit Court decision were both submitted in the briefs presented and in the oral argument in relation thereto.*

2. It is contended by the petitioner that the indictment, upon which he was brought to trial, fails to conform in the matter of allegations and substance to the foundational requirements of constitutional amendments 5 and 6 to the United States Constitution, and that the position taken by the Ninth Circuit Court of Appeals in relation thereto is in sharp conflict with the decisions of other jurisdictions.[1]

3. The petitioner contends that in the instant case sought to be reviewed, the Government has sought to carve out of a single transaction two causes upon which double punishment has been imposed upon your petitioner.

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*_Nordone v. United States_, 302 U. S. 379; 308 U. S. 338;
Weiss v. United States, 308 U. S. 321;
United States v. Polakoff, et al., 112 Fed. (2d) 888, 889.

[1]See p. 5, Petition for Writ of Certiorari heretofore filed.

4. Petitioner, in the instant case, presents for examination and consideration by this Honorable Court an important question not heretofore decided, in so far as petitioner can ascertain, by this, or any Circuit Court in the United States, namely, the question as to the right of trial counsel to waive admitted prejudicial error:

(a) In any instance; and

(b) In the absence of consent by the defendant personally.

5. The final question presented by petitioner is the query whether a Circuit Court of Appeals may properly refuse to consider manifest prejudicial error involving the defendant's constitutional, fundamental and substantial rights because, in its opinion, the record has not been preserved with a particularity interpreted to be requisite before such errors will be considered or decided, notwithstanding that on authorities of this Court, the errors were flagrant and manifest and that the objections interposed were sufficient in substance, but not, perhaps, in form to induce the tribunal whose opinion it is sought to review, as indeed it did, to consider petitioner's appeal on the merits.*

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*See Opinion in Appendix of Petition for Writ of Certiorari.

ARGUMENT.

What the petitioner requests the Court to consider here is not a question of conflict of evidence, but whether the evidence upon which the judgments are grounded:

(a) Was received competently on authorities of this Court;[2] and

(b) Whether petitioner received that fair and impartial trial presumed to be secured under the laws of the United States, and whether petitioner's constitutional rights were indeed jeopardized on the altar of arbitrary construction of appellate court rules, in disregard of a patent reception of evidence, previously held to be inadmissible by this Court, and refusal to consider errors heretofore deemed sufficient for reversal because of failure of trial counsel to adhere to form in lieu of substance in his presentment of petitioner's cause in the appellate tribunal.

Argument on Point 1 of Issues Involved.

Petitioner, in the Circuit Court, urged that the case against him rested entirely on two intercepted telephone conversations, as related in "Brief Statement of Facts," pages 7 to 10 of petition, which indisputably is a fact which cannot be controverted. The decisions of this Court, to-wit, *Nordone v. United States*, 302 U. S. 379, 308 U. S. 338; *Weiss v. United States*, 308 U. S. 321, together with the case of *United States v. Polakoff et al.*, 112 Fed. (2d) 888, at page 889, were presented and argued, but the opin-

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[2]*Nordone v. United States, supra;*
Weiss v. United States, supra.

ion of the Circuit Court of Appeals [R. 284-288] does not answer the question; in fact, the question is entirely ignored. However, by necessary intendment, said decision is contrary to the holdings of this Court and the Circuit Court opinion in *United States v. Polakoff, supra.*

The statement of facts and the evidence do clearly show that Section 605 of the Federal Communications Act, providing that no person, not being authorized by the sender, shall intercept any communication, and divulge or publish the existence, contents, substance, purport or effect or meaning of such intercepted communication to any person, has been violated in connection with the case of your petitioner, in that the entire case of the Government rests upon the interception of two telephone conversations allegedly between your petitioner and a witness not produced at the trial. Since the sender, in this case, of the communication upon which the Government rested its case, was your petitioner, who did not consent to the divulgence of the matters testified to at the trial, the evidence of the purported telephonic conversations was erroneously admitted in contravention of the declared legal concepts embraced by the Fourth and Fifth Amendments to the Constitution of the United States and Section 605 of the Federal Communications Act, and since the provisos aforementioned forbid the acquisition of evidence in that particular way, and proscribe its use at all,[3] the facts of the instant case, as supported by the record, establish that the Government's case against your petitioner is supported solely by the fruits of the legally poisonous tree.[4]

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[3]*Silverthorne Company v. United States,* 251 U. S. 385, 392.

[4]*Nordone v. United States, supra.*

Argument on Point 2 of Issues Involved.

Petitioner heretofore, in his application for writ of certiorari, set forth by apt reference to the record that even the statutory provisos were not followed in the indictment, affording your petitioner the rights secured by the Sixth Amendment.[5]

Petitioner contends that he was entitled to be informed of the nature and cause of the accusation in order to afford him the opportunity of making his defense with some degree of particularity, if for no other reason than to enable him to plead former jeopardy in case he should thereafter be indicted for the same offense.

The indictment [R. 1 to 3] is totally lacking in this requirement on authority of *Boykin v. United States, supra;*[5] *Myers v. United States,* 15 Fed. (2d) 987; *Fontana v. United States,* 262 Fed. 283, and *Bratton v. United States,* 73 Fed. (2d) 798.

Since the demurrer in the case of your petitioner [R. 4-7] was overruled and the ruling of the Circuit Court of Appeals for the Ninth Circuit is in sharp and direct conflict with the Fifth, Eighth and Tenth Circuits, as reflected in the Table of Specific Circuits, showing a conflict, as appears on page 5 of the petition for writ of certiorari herein, petitioner contends that said conflict calls for clarification and authoritative determination by this Court.

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[5]*Boykin v. United States,* 11 Fed. (2d) 484.

Argument on Point 3 of Issues Involved.

Petitioner has heretofore submitted that the Government sought to and indeed succeeded in carving two causes out of a single alleged offense upon which a double punishment has been imposed upon your petitioner. [R. 27, 28.]

Petitioner contends that while a general or gross sentence may be imposed on a verdict of guilty on an indictment containing several counts, providing it does not exceed the aggregate of punishments which could have been imposed upon a single count, the rule has been violated in the case of this petitioner, and the sentences imposed exceed the limits imposed by the Act of Congress, and such sentence therefore is void on authority of *Ex parte Lange,* 18 Wall., 85 U. S. 163, 21 L. Ed. 872, and the sentences imposed upon your petitioner violated the constitutional guarantee against double punishment for the reason that a second punishment is attempted to be inflicted for the same offense by a judicial sentence.

The opinion of the Circuit Court of Appeals [R. 284-288] does not answer this question, but essays to merely declare that the assignments are *too general,* and fails to reconcile its position to that taken in the case of *Copperwaithe v. United States,* 37 Fed. (2) 846, at 847, which opinion holds that the Government may punish for either offense, *i. e.,* violation of Title 21, U. S. C. A., Section 174 or Section 2553(a) of the Internal Revenue Code, but cannot mete out a double punishment for a single continuous transaction.

There exists a sharp conflict between the holding in the Circuit Court of Appeals for the Ninth Circuit and the *Copperwaithe* case, cited *supra,* as well as the cases of *Duffy v. Hudspeth,* 112 Fed. (2d) 559, and *Caballera v.*

Hudspeth, 114 Fed. (2d) 554. The following cases, which conflict,[6] call for clarification and authoritative determination by this Court.

Argument on Point 4 of Issues Involved.

In respect to the question raised by the petitioner concerning the right of counsel for an accused to waive prejudicial error, which the Court on its own motion characterized *as necessarily calling for a mistrial* [R. 81 to 88], it should be noted that after the trial court had declared there was nothing to do but declare a mistrial, that counsel suggested that the jury be admonished to disregard the matter and withdrew the assignment. However, petitioner, as the record will reflect, did not join in this request, or personally consent to a waiver of this error.

In the case of *United States v. Newman,* 25 Fed. (2d) 357, a case arising in the District of Columbia, cited as authority on this question, it was held that it does not lie within the power of counsel to waive an error to the prejudice of his client. Extensive research discloses a total absence of any expression of authority on this question, other than the *Newman* case, cited *supra.* The subject, in general, is discussed in *Corpus Juris Secundum,* Volume 7, Section 100c, pp. 922-923, wherein the text presents the general statement in the following form:

> "In the absence of express authority, an attorney generally has no power, by stipulation, agreement, or

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[6] *Miller v. United States,* 300 Fed. 529;
Perez v. United States, 10 Fed. (2d) 352;
Foster v. United States, 11 Fed. (2d) 100;
O'Brien v. United States, 51 Fed. (2d) 192;
Ex Parte Farlow, 272 Fed. 910.

> otherwise, to waive or surrender the substantial legal rights of his client . . . that an attorney has no right to surrender a right of his client so substantial as the right of appeal, unless authority to do so has been expressly conferred, and that he cannot waive error of the court to the prejudice of his client."

A fortiori, if an attorney may not waive the right to appeal, can he waive admitted prejudicial error, after the trial court has, on its own motion, declared the assignment of such prejudicial misconduct, as calling for a mistrial. It appears that this question is of sufficient import to call for a clarification and authoritative determination by this Court of this important, fundamental right by applicable expression by this Court.

The opinion of the Circuit Court of Appeals for the Ninth Circuit does not answer this question, but in fact, erroneously declares that the record shows that the question was not objected to, whereas the record in fact shows a series of objections and exceptions [pp. 80, 82-83]. However, it is important to note that the question under discussion, treated in the opinion as Assignment No. 11, disposes of this point on the theory that *"appellant"* having brought about this result, namely, the withdrawal of the assignment of misconduct, "cannot be heard to complain of it."

It is apparent that the Circuit Court of Appeals takes the position that petitioner's counsel at the trial had the *implied authority* to waive admitted prejudicial misconduct. It is this aspect of the question which petitioner contends deserves the attention of this Court.

In *Ray v. United States,* 114 Fed. (2d) 508, at page 511, it was declared:

> "Where prejudicial error is obvious in a criminal case, appellate courts *should* of their own motion recognize it, and give protection against wrongful conviction." (Citing cases.[7])

Argument on Point 5 of Issues Involved.

In an endeavor to avoid the raising of too many general legal questions, petitioner has presented a question involving the propriety of the Circuit Court declining to consider a multitude of manifestly prejudicial errors on purely super-technical grounds.

As heretofore urged, on authority of *Ray v. United States, supra,* it is petitioner's contention that prejudicial error, where obvious, should be recognized by the appellate tribunal.

The opinion of the Circuit Court of Appeals unquestionably reflects a disinclination to consider a multitude of assignments of error presented to said tribunal by your petitioner, and in some instances, on the alleged ground that he did not apparently comply with the rules or regulations of said Court; this in total disregard of the fundamental fact that it is not anywhere denied in said opinion that the errors complained of are *substantial;* and, in truth and in fact, deprive your petitioner of that fair and impartial trial guaranteed by the laws of these United States.

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[7]*Booth v. United States,* 10th Circuit, 57 Fed. (2d) 182, and *Elderd v. United States,* 4th Circuit, 44 Fed. (2d) 170.

There are only two authorities cited in the opinion; the one primarily relied upon is the case of *Waggoner v. United States,* its own opinion, reported in 113 Fed. (2d) 867. Petitioner respectfully, but nevertheless deferentially, suggests that this Honorable Court *read this authority.* Petitioner frankly concedes that the said citation is authority for the refusal of the Court below to consider, if it chooses, any and all questions urged as grounds for reversal, so long as said Court, in its opinion, feels that appellant has not complied with its construction of its requirements.

It is respectfully submitted by petitioner that the *Waggoner* case, *supra,* and the opinion in this case, should definitely *not be recognized as authority* exemplifying an approved manner in which appellate tribunals should regard and consider causes presented for review on appeal, especially so where the law enunciated by this Court shows that errors committed at the trial call for reversal.[8]

It is petitioner's view that inquiry must always be as to whether, in view of the whole record, the appellate tribunal may fairly conclude that there has not been a miscarriage of justice.[9]

This Court, in its decision in the case of *United States v. Atkinson,* 297 U. S. 157, enunciated that appellate courts in the public interest may of their own motion note errors to which even no exception has been taken, where the errors are obvious.

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[8]*Nordone v. United States, supra;*
Weiss v. United States, supra.

[9]*Moore v. United States,* 224 Fed. 95;
Sykes v. United States, 204 Fed. 909.

This doctrine has been re-enunciated in the case of *United States v. White,* 77 Fed. (2d) 757, and in the text of Marker on Federal Appellate Jurisdiction, etc., page 151, paragraph 97, where it is enunciated that "where life or liberty is involved, the appellate court does not require the strict compliance insisted on in a civil case. If it appears from the whole record that there has been a miscarriage of justice, a reversal will be ordered, even though there is no proper bill of exceptions in the record on appeal," citing *Moore v. United States,* 224 Fed. 95. See, also, the pronouncements in other courts,[10] and see the reasons, as set forth by Mr. Justice Stone, in the case of *New York Central Ry. v. Johnson,* 279 U. S. 310.

Petitioner, in his argument on the previous point, has alluded to an incident which the trial court characterized as sufficiently prejudicial to call for a mistrial. One of the important points urged in the Court below was the misconduct of Government counsel in deliberately reiterating with special emphasis the matters which the trial court in the early phase of the trial characterized as prejudicial and calling for a mistrial.[11]

It will be noted that the conclusion is inescapable that the Government counsel's attention had been manifestly called to the prejudicial character of these matters, yet the opinion of the Court below declined to regard or consider this error because of the failure of trial counsel to uselessly suggest to the trial court that counsel be *readmonished* to not refer to this acknowledged prejudicial matter.

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[10]*Pierce v. United States,* 86 Fed. (2d) 949; 28 U.S.C.A. Sec. 391; *Berger v. United States,* 295 U. S. 78; *Crawford v. United States,* 212 U. S. 183.

[11]Argument on p. 4 of Issues Involved, *infra.*

Petitioner takes the view that there is ample authority that a readmonishment was not jurisdictionally requisite in order to require an appellate tribunal to take cognizance of an attempt by Government counsel to appeal to the prejudice of the jury.[12]

In conclusion, there are two additional observations under this general topic, which Petitioner respectfully suggests that the opinion of the Court below does not answer, namely, the contention that the trial court should have granted the instructions requested after the jury returned, in the manner reflected in the statement of facts.*

Petitioner believes that the pronouncement in *Berger v. United States,* 62 Fed. Rep. (2d) 438, at page 440, that such charges are calculated to prevent the jury from wrongfully being coerced into arriving at a verdict is a correct pronouncement of law, and that the trial court's inquiry put to the jury for the purpose of ascertaining the extent of its division numerically in the manner reflected by the record, pages 232 to 234, on authority of this Court, to-wit, *Brasfield v. United States,* 272 U. S. 448, was *per se* sufficient to require a reversal of the judgments sought to be reviewed by the Circuit Court below.

It is therefore plain that the course of the proceedings of the case at bar was not legally sound nor just to your petitioner, and not in conformity with due process of law, as recognized by this tribunal.

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[12]*Berger v. United States, supra;*
Pharr v. United States, 48 Fed. (2d) 767;
Volkner v. United States, 13 Fed. (2d) 594;
New York Central Ry. v. Johnson, supra;
DeBonis v. United States, 54 Fed. (2d) 3.

*Petition for Writ of Certiorari, p. 12.

Wherefore, because of the gravity and importance of the questions involved, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, demanding them, and each of them, to certify and send to this Court, on a day certain to be designated, a full and complete transcript of the record and proceedings in said Circuit Court of Appeals in the said case lately pending therein entitled, "James Utley, Appellant, vs. United States of America, Appellee," No. 9370, to the end that the decision and judgment of said Circuit Court of Appeals may be reviewed, as provided in 28 U. S. C., Section 347, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate and in conformity with said Act, and that the decisions and the judgments of said Circuit Court of Appeals and of the United States District Court, in and for the Southern District of California, Central Division, in the said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioner now presents as an exhibit to his petition a certified copy of the entire transcript of record of the case, including the proceedings in the United States Circuit Court of Appeals for the Ninth Circuit, to which Court he prays the writ of certiorari may be directed, and your petitioner will ever pray.

Dated at Los Angeles, California, November 26, 1940.

JOHN T. SHEFFIELD,
Attorney for Petitioner.

A. BRIGHAM ROSE,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 590

JAMES UTLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 284–288) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 25, 1940 (R. 289). The petition for a writ of certiorari was filed November 22, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

QUESTIONS PRESENTED

1. Whether in the absence of objection or exception properly saving the question for appellate review, the Circuit Court of Appeals erred in declining to consider whether, under the circumstances of this case, the divulgence of the contents of certain telephone conversations by a witness not a party thereto was prohibited by Section 605 of the Communications Act of 1934.

2. Whether the Circuit Court of Appeals erred in failing to pass on the sufficiency of the indictment when petitioner did not except to the ruling of the trial court, did not specify it as error, and did not brief or argue it on appeal.

3. Whether the Circuit Court of Appeals erred in failing to consider whether the trial court imposed double punishment in sentencing petitioner on both counts of the indictment.

4. Whether the trial court should have declared a mistrial, because of alleged misconduct of the prosecutor.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra,* pp. 13–14.

STATEMENT

On September 20, 1939, an indictment in two counts was returned against the petitioner in the District Court for the Southern District of California (R. 1–3). The first count charged peti-

tioner with purchasing, selling, dispensing, and distributing 200 grains of smoking opium which was not in or from the original stamped package containing such opium, in violation of Section 2553 (a) of the Internal Revenue Code, 26 U. S. C., § 2553 (a) (Appendix, *infra*, p. 14). The second count charged petitioner with knowingly and fraudulently receiving, concealing, buying, selling, and facilitating the transportation and concealment after importation of 200 grains of smoking opium, knowing the same to have been imported contrary to law, in violation of U. S. C., Title 21, Sec. 724 (Appendix, *infra*, p. 15).

The petitioner's demurrer to the indictment, made on the grounds that neither count stated an offense or sufficiently informed petitioner of the nature of the charge (R. 4–5), was overruled (R. 7). Petitioner was tried and convicted under both counts (R. 12–13), and was sentenced to imprisonment for one year, eleven months, and thirteen days on the first count and five years on the second count. Execution of sentence on count two was suspended and petitioner was placed on probation for a period of five years from the date of his release under the sentence imposed on count one (R. 28). On appeal, the judgment of conviction was unanimously affirmed by the Circuit Court of Appeals for the Ninth Circuit (R. 284–289).

The evidence shows that on January 23, 1937, two Los Angeles police officers entered an apart-

ment occupied by two women, Betty Angel and Marian O'Neill. While the officers were in the apartment, Betty Angel had two telephone conversations with defendant in which arrangement was made for the delivery of the narcotics which were the subject of this indictment. Officer Clarke overhead these telephone conversations by placing his ear close to the receiver (R. 57, 60–61). Thereafter, defendant arrived with the narcotics and was arrested by the two officers (R. 71–74). The testimony of these two officers and subsequent statements of defendant in the nature of admissions (R. 74, 156, 160) resulted in the defendant's conviction.

Officer Clarke testified to the substance of these conversations which was to the effect that defendant would supply Betty Angel with a 50-fung jar of "black stuff" for $22.50, and she was to have the money ready when he arrived (R. 58, 60, 61, 62). Defendant's counsel objected to certain portions of this testimony on the grounds that no sufficient foundation had been laid to connect defendant with the voice at the other end of the telephone, that certain questions called for opinion testimony, and that other questions were leading (R. 50, 53, 56, 57, 58, 59). At no time did he suggest that the evidence was inadmissible, if proper foundation were laid. No objection was made on the grounds that the testimony was inadmissible as a violation of the Communications Act nor was any exception

taken to any ruling of the court. No assignment of error challenged the admissibility of the testimony on these grounds (Assignments 6, 7, 12, 26, 27, 28).

In the course of the trial, counsel for the Government elicited testimony tending to show that defendant had attempted to bribe the police officers (R. 83). Defendant objected that this was prejudicial, but upon an offer of the court to declare a mistrial, he withdrew the objection and the court admonished the jury to disregard the testimony (R. 87–88).

The trial court charged the jury that they might find the defendant guilty on both counts of the indictment if they found that he distributed or possessed the narcotics in question in or from unstamped packages unless he satisfactorily explained his possession or distribution (R. 215, 219–220). At the conclusion of the instructions defendant's counsel said: "The defendant is satisfied with the Court's instructions" (R. 225).

ARGUMENT

I

Petitioner asks this Court to grant a writ of certiorari on the grounds that evidence was admitted contrary to Section 605 of the Communications Act of 1934, 47 U. S. C., Sec. 605 [1] (Pet. 4, Br. 5). In the first place, it is clear that the question is not one proper for review because no objection or exception was taken in the trial court to the admission

[1] Appendix, *infra*, p. 15.

of the testimony, no assignment of error was taken to the Circuit Court of Appeals, and that court did not pass on it. In this state of the record, the substantive problem of admissibility of this evidence is not properly here for review. *Wood* v. *A. Wilbert's Sons Shingle & Lumber Co.*, 226 U. S. 384; *Edward Hines Yellow Pine Trustees* v. *Martin*, 268 U. S. 458, 465; *Canal & C. Streets R. Co.* v. *Hart*, 114 U. S. 654, 663; *Southern Pine Lumber Co.* v. *Ward*, 208 U. S. 126, 143; *United States* v. *Atkinson*, 297 U. S. 157; *McBride* v. *United States*, 284 Fed. 416, 419 (C. C. A. 5th), cert. denied, 261 U. S. 614.

Secondly, the evidence was properly admitted. *Nardone* v. *United States*, 302 U. S. 379; *Nardone* v. *United States*, 308 U. S. 338; and *Weiss* v. *United States*, 308 U. S. 321, have no application. We are not here confronted with any problem of "wire tapping." Officer Clarke simply overheard what was said by each of the parties to telephone conversations. There was no "interception" of any kind. It seems perfectly clear that the mere overhearing of a telephone conversation was never intended by Congress to constitute an "interception" within the meaning of Section 605. Although there is language in *United States* v. *Polakoff*, 112 F. (2d) 888 (C. C. A. 2d), certiorari denied, October 14, 1940, No. 295, present term, which supports petitioner's contention, that case involved the interception of a telephone conversation by means of a recording device connected with a telephone

extension. It is also made clear in the opinion in that case that the introduction of the telephone conversation was highly damaging to the defendant and, if inadmissible, was so prejudicial as to warrant reversal.

Thirdly, the recital of what petitioner said over the telephone was in no way essential to the Government's case. The essential facts which led to conviction were the delivery (R. 71–72, 74–75) of the smoking opium (R. 47–49) and the acceptance of money therefor (R. 74, 76–78, 107–108, 110, 126). These facts were testified to by the police officers of their own knowledge and this testimony, apart from the evidence of the telephone conversations, was abundantly sufficient to warrant a conviction. Since Betty Angel, a party to the conversations, was cooperating with the police it is plain that officers Clarke and Duede were not dependent on the alleged "interception" for their information of the pending delivery and would have been present when defendant delivered the opium whether officer Clarke had overheard the conversations or not.

Fourthly, petitioner asserts that the Circuit Court of Appeals should have disregarded the lack of objection and exception and specification of error and considered the merits of petitioner's contention. It is, of course, true that an appellate court may, in its discretion, consider obvious errors committed by a lower court where failure so to do would result in a gross miscarriage of justice, or

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"seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Atkinson,* 297 U. S. 157, 160. In view of the fact that the evidence was neither essential to the prosecution nor prejudicial to the defendant, the error in admitting it, if error there was, could not result in a miscarriage of justice. Consequently, the refusal of the court to discuss the question was not an abuse of discretion (*United States* v. *Reed,* 96 F. (2d) 785 (C. C. A. 2d), cert. den. 305 U. S. 612), and is not subject to review in this Court.

II

Petitioner next contends that the indictment did not sufficiently inform him of the nature and cause of the accusation against him. His demurrer to the indictment was overruled in the trial court. Petitioner did not specify this ruling as error in the Circuit Court of Appeals, nor did he argue the question either in his brief or orally in that court which, for that reason deemed the point to have been waived (R. 285). That decision was correct. *Schnitzer* v. *United States,* 77 F. (2d) 233 (C. C. A. 8th); *Callahan* v. *United States,* 53 F. (2d) 467 (C. C. A. 3d), aff'd 285 U. S. 515; *Rettich* v. *United States,* 84 F. (2d) 118 (C. C. A. 1st).

In any event, the indictment was sufficient (*Husty* v. *United States,* 282 U. S. 694), and the conviction would have to be sustained. Each count of the indictment charged an offense sub-

stantially in the terms of the respective statutes. Cf. *Debs* v. *United States,* 249 U. S. 211. It is not contended that the indictment failed to charge offenses, but rather that it failed to specify with particularity the circumstances of the offenses. The defendant filed no motion in the trial court for a bill of particulars, and there is not the slightest indication in the record that he was taken by surprise or was in doubt as to the offense charged. He is unable to show any prejudice whatsoever or that he was deprived of any substantial right. *Berger* v. *United States,* 295 U. S. 79, 81, 82; *Myers* v. *United States,* 15 F. (2d) 977, 985 (C. C. A. 8th); *Perez* v. *United States,* 10 F. (2d) 352, 353 (C. C. A. 9th); *United States* v. *Polakoff,* 112 F. (2d) 888, 890 (C. C. A. 2d), certiorari denied, October 14, 1940, No. 295, present term. The degree of particularity needed in a criminal indictment is necessarily a matter to be decided on the facts and circumstances of each case. As petitioner points out in his petition (Pet. 5) it appears that the Circuit Court of Appeals for the Eighth Circuit is more strict than the Circuit Court of Appeals for the Ninth Circuit. In the Eighth Circuit extreme particularity is required in the indictment. In the Ninth Circuit any doubt which an accused may have as to the circumstances of the offense may be readily remedied by a bill of particulars. The result in each case is to protect an accused from surprise or prejudice arising from the incompleteness of the charge against him. This

Court has hitherto refused to reconcile these alternative means to secure the same end, in cases where the petitioners had adequately presented the point. *Davis* v. *United States,* 49 F. (2d) 267, 269 (C. C. A. 4th), certiorari denied, 283 U. S. 859; *Wilson* v. *United States,* 59 F. (2d) 1 (C. C. A. 5th), certiorari denied, 287 U. S. 623; *United States* v. *Busch,* 64 F. (2d) 27 (C. C. A. 2d), certiorari denied, 290 U. S. 627.

III

Petitioner contends that double punishment was inflicted in this case and cites a conflict of decision with *Copperthwaite* v. *United States,* 37 F. (2d) 846 (C. C. A. 6th) and *Ballerini* v. *Aderholt,* 44 F. (2d) 352 (C. C. A. 5th) (Pet. 6). The court below expressly refused to consider the question since the assignment of error was unintelligible, too general, and not in compliance with its rules (R. 288). But had it decided this issue adversely to the petitioner, such decision would have been clearly correct. The test established in *Blockburger* v. *United States,* 284 U. S. 299, 304, for determining whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not. Under the Harrison Narcotic Act there must be proof that the purchase, sale, or distribution was not in or from the original stamped package (Appendix, infra, p. 13). Under the Narcotic Drugs Import and Export Act, there must be proof that the purchase, concealment, sale, or facilitation of

transportation be of a narcotic drug which has been imported contrary to law and that it was known by the offender to have been so illegally imported. (Appendix, infra, p. 14.) Obviously these are quite separate elements and their concurrence in one transaction results in the commission of two offenses. This point is foreclosed by the *Blockburger* case which expressly resolved the conflict which petitioner now asserts adversely to petitioner's present contention.[2]

IV

1. Petitioner's fourth contention is that the trial court erred in not declaring a mistrial after petitioner's counsel requested the court not to declare a mistrial but rather to admonish the jury and strike from the record the objectionable testimony. In the first place, petitioner should not be heard to

[2] *Ballerini* v. *Aderholt* was specifically disapproved. The reasoning of the dictum in the *Copperthwaite* case, which was brought to the attention of the Court in the *Blockburger* case (No. 374, October Term, 1931, Br. for the United States, p. 11), is inconsistent with the holding in the *Blockburger* decision. Cases since 1931 have consistently held that the statutes create distinct offenses so that consecutive sentences do not amount to double punishment. *Silverman* v. *United States*, 59 F. (2d) 636, 637 338 (C. C. A. 1st), certiorari denied, 287 U. S. 640; *Yep* v. *United States*, 81 F. (2d) 637, 638 (C. C. A. 10th), reversed on other grounds, 83 F. (2d) 41; *Mullaney* v. *United States*, 82 F. (2d) 638, 644 (C. C. A. 9th); *Jindra* v. *United States*, 69 F. (2d) 429, 430 (C. C. A. 5th), certiorari denied, 292 U. S. 651; *Corollo* v. *Dutton*, 63 F. (2d) 7, 8 (C. C. A. 5th).

complain of any error in this action as he brought it upon himself. (See opinion of the court below. R. 287). In the second place, the admonition of the trial judge to the jury to disregard the objectionable testimony completely cured the error. (*Gilmore* v. *United States,* 268 Fed. 719 (C. C. A. 5th), certiorari denied, 255 U. S. 576; *Spivey* v. *United States,* 109 F. (2d) 181 (C. C. A. 5th), certiorari denied, 310 U. S. 631; *Landay* v. *United States,* 108 F. (2d) 698 (C. C. A. 6th), certiorari denied, 309 U. S. 681.)

2. Petitioner in his brief in support of his petition for certiorari (Br. 13, 14) complains of prejudicial misconduct on the part of the District Attorney in his address to the jury. Since this was not included in the reasons advanced in the petition (Pet. 4–6), petitioner is not entitled to raise it. *General Pictures Co.* v. *Electric Co.,* 304 U. S. 175, 177–178. But if he were, since no exception was taken in the trial court and since the Circuit Court of Appeals for that reason did not pass on this issue, it is not subject to review. Were it subject to review, we submit that it was in all respects proper and any comments outside the record were directly invited by petitioner's counsel and were not prejudicial. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 237, 238, 239; *United States* v. *German,* 115 Fed. 987, 989–990 (W. D. Ky.).

CONCLUSION

The petition for writ of certiorari presents no questions of importance nor substantial conflict of decision and we respectfully submit that it should be denied.

FRANCIS BIDDLE,
Solicitor General.
WENDELL BERGE,
Acting Assistant Attorney General.
FRED E. STRINE,
HARDY MACLAY,
ANDERSON PAGE,
Attorneys.

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APPENDIX

Section 2553 (a) of the Internal Revenue Code (derived from Section 1 of the Harrison Narcotic Act of December 17, 1914, c. 1, 38 Stat. 785, as amended) provides:

> It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps for any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.

Section 2557 (b) of the Internal Revenue Code (derived from Section 9 of the Harrison Narcotic Act) provides in part:

> (1) Any person who violates or fails to comply with any of the requirements of this subchapter or part V of subchapter A of chapter 27, shall, on conviction, be fined not more than $2,000 or be imprisoned not more than five years, or both, in the discretion of the court."

U. S. C., Title 21, Sec. 174 (Sections 2 (c) and (f) of the Narcotic Drugs Import and Export Act of February 9, 1909, c. 100, 35 Stat. 614, as amended), provides:

> If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Section 605 of the Communications Act of 1934, c. 652, 48 Stat. 1064, 1103–1104 (U. S. C., Title 47, Sec. 605) provides in part:

> * * * and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * *

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